IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-617

CHARLES CULHANE AND GERALD MCGIVERN,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Petitioners Charles Culhane and Gerald McGivern pray that a writ of certiorari issue to review the judgment of the Court of Appeals of New York, dated July 13, 1978, which affirmed judgments of conviction of the Ulster County Court, Ulster County, New York, rendered April 23, 1975, sentencing petitioners to an indeterminate sentence with a maximum of life imprisonment and a minimum of twenty-five (25) years on the finding

of guilt of second-degree (felony) murder under the provisions of New York Penal Law § 125.25(3). The one count indictment charged petitioners with felony murder for causing the death of a peace officer during an attempt to escape from custody. Petitioners are incarcerated at Green Haven Correctional Facility, Stormville, New York.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals of New York, reported as *People v. Culhane*, 45 N.Y.S.2d 757 (1978), and the opinion of the Supreme Court, Appellate Division, reported as *People v. Culhane*, 57 A.D.2d 418, 395 N.Y.2d 517 (3d Dep't. 1977), are printed in the Appendix as A and B, respectively. Since both opinions refer to the statement of facts in an earlier appeal in the same case, reported as *People v. Culhane*, 33 N.Y.2d 90, 95-6, 350 N.Y.S.2d 381, 385-6, 305 N.E.2d 469, 472-3 (1973), that segment is printed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals of New York was entered on July 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether it was a violation of the petitioners' sixth amendment right to compulsory process, and fifth and fourteenth amendment right of due process of law, to exclude competent, relevant exculpatory evidence tending to show that a person other than the petitioners committed the offense?

2. Whether it was a violation of petitioner McGivern's privilege against compulsory self-incrimination to permit

cross-examination of him on his not having testified in his own defense in a prior trial of the same case, and to permit the prosecutor to argue in summation that an adverse inference should be drawn from the prior silence? Should *Raffel v. United States*, 271 U.S. 494 (1926), be explicitly overruled?

STATEMENT OF THE CASE

This case has been tried three times. The first trial resulted in a hung jury and a mistrial. On the second trial the defendants were convicted and sentenced to death. The Court of Appeals of New York set aside their first conviction. Through all proceedings Culhane and McGivern have protested their innocence.

The facts are as follows. In September, 1968, three prisoners, Charles Culhane, Gerald McGivern and Robert Bowerman were being transported by car from Auburn Prison in New York to a hearing in Westchester County, by two deputy sheriffs, Joseph Singer and William Fitzgerald. The trip ended, short of its destination, in the shooting deaths of Bowerman and Fitzgerald and gunshot wounds to Singer, Culhane and McGivern. The three survivors were the only eyewitnesses. Culhane and McGivern were charged with murder in the death of Fitzgerald, and have claimed that Bowerman, in a solo escape attempt, killed Fitzgerald while they sat as horrified witnesses.

The three prisoners were each handcuffed; the chain linking their cuffs was passed through a leather security belt around the waist. They sat in the back seat of the car, with Bowerman near the passenger side door, McGivern in the middle and Culhane near the driver's side door. Singer drove and Fitzgerald sat next to him on the front seat.

Several times during the trip down the New York Thruway, Bowerman complained of the need to urinate, and each time the car was stopped to permit him to do so. In the early afternoon, Bowerman again said he wanted to urinate. Fitzgerald told Singer to pull over.

At this point in the narrative, the facts are sharply in dispute. The petitioners testified that Bowerman had cut his security belt with a razor blade, and motioned to McGivern and Culhane to do the same. McGivern and Culhane did not comply. Thereafter, petitioners testified, Bowerman struck at Fitzgerald and Singer and grabbed Singer's gun. Holding the other occupants of the car at gunpoint, Bowerman undid Culhane's belt and told Culhane to undo McGivern's belt. Fitzgerald then turned, gun in hand, and he and Bowerman exchanged shots. In the ensuing exchange of gunfire, Bowerman and Fitzgerald were killed, and McGivern and Culhane seriously injured.

Singer's version was that as the car slowed to a stop, Culhane reached over Singer's head and choked him. Singer said that at the same moment Bowerman did the same thing to Fitzgerald. Then, said Singer, McGivern took Singer's gun. Fitzgerald pulled his own weapon. Two or three shots were fired in the car. Singer then stated that he took back his own weapon from McGivern and that Culhane grabbed Fitzgerald's gun. Singer fired at Culhane; at one time he had said he hit Culhane, but changed his story when it became clear he could not have done so. Singer then took Fitzgerald's gun. According to his version, he fired away with both weapons. Bowerman had reached for the gun in Singer's right hand and was holding the barrel while Singer fired at him.

It was agreed that Culhane and then McGivern managed to get out of the car. It was also undisputed

that Singer's gun was fired twice during the affray, and Fitzgerald's five-shot revolver was emptied.

Bowerman was killed with bullets from Fitzgerald's gun. Culhane was injured with bullets from the same gun. The bullet removed from Fitzgerald's body had come from Singer's weapon. No scientific tests were performed to determine who fired a weapon. Thus, the credibility of each witness was sharply in issue.

Tending to corroborate the petitioners' version was expert testimony that Culhane's wounds were consistent with an effort to cover his head with his hands.

Defense counsel sought to corroborate the petitioners version by offering documentary evidence that Bowerman had a history of solo escape attempts in which he tried to seize guns from, and once even shot, peace officers. This prior criminal conduct of Bowerman and his psychiatric record, embodied in what was marked at trial as Defendants' Exhibit O, was offered to prove both that his efforts on September 13, 1968 were part of a long-standing scheme, and that he was a person who was accustomed to committing the very type of act which the petitioners testified he committed on this occasion. The trial court refused to permit these prior events to be proved in the petitioners' case and cut off cross-examination about Bowerman's characteristics.[1]

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[1] Defendants' Exhibit O, which was kept from the jury, includes the following excerpts:

> "At Elmira Reception Center, Bowerman made a very poor adjustment. He behaved in a depressed and emotionally unstable fashion, and was finally declared by the institution psychiatrist to be suffering from a psychosis. He was transferred to Matteawan Hospital on Oct. 4, 1955, where he remained until Jan. 26, 1956

[footnote continued]

McGivern testified in his own defense. McGivern had not testified in the prior trials; Culhane had testified. The trial court permitted questioning (over objection) establishing the fact that at the prior trials of the case, McGivern had exercised his constitutional right not to testify. The prosecution was permitted to cross-examine McGivern on both McGivern's prior silence and Culhane's prior testimony. The prosecutor repeatedly urged the jury to draw an adverse inference from McGivern's prior silence.[2]

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when he was returned to Elmira Reception Center." O-9, p.4.

"On Apr. 24, 1963, at 6:35 P.M., in front of 203 West 42nd Street, Manhattan, the defendant, in an attempt to avoid arrest for his involvement in the instant offense, assaulted Patrolman Theodore Vasakes of the 16th Precinct by pointing a loaded pistol at him, and attempted to steal from his person a .38-calibre Smith & Wesson pistol valued at $48.00.

"Shortly thereafter, the defendant attempted to kill Detective Robert Corrigan of the 50th Squad by shooting a loaded pistol at him, inflicting injuries which necessitated Detective Corrigan's hospitalization." O-11, pp. 6-7.

"The records indicate this inmate attempted suicide in 1954 by slashing his arms." Letter dated March 10, 1964 from L. V. Granger, Guidance Counselor, to Mr. Addison Byram, Acting Warden and Dr. James Gaetaniello, Chief Psychiatrist, O-41.

"In October 1963, while being treated at Meadowbrook Hospital he attempted to escape from a correction officer."

"Police officers consider this inmate highly dangerous." Letter dated March 10, 1964 from L. V. Granger, Guidance Counselor, to Mr. Addison Byram, Acting Warden, O-42.

[2]Excerpts from the cross-examinations and summation are attached as Appendix D. Although the opinions in the New York courts do not refer to this point, it was briefed before both reviewing panels.

REASONS FOR GRANTING THE WRIT

I. Compulsory Process.

THE DECISION OF THE NEW YORK COURT OF APPEALS POSITS A DUBIOUS RULE OF EVIDENCE AS A BAR TO SIXTH AMENDMENT COMPULSORY PROCESS RIGHTS, IN CONFLICT WITH THE PRINCIPLES OF *CHAMBERS v. MISSISSIPPI*, 410 U.S. 284 (1973) AND *WASHINGTON v. TEXAS*, 388 U.S. 14 (1967), AND OF IMPORTANCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

At issue, and worthy of review, is the ability of a defendant to obtain and present to a trial jury exculpatory evidence on the issue on which guilt or innocence depends.[3]

As the dissenting Judge correctly noted below, the central factual issue of the trial was clearly framed: "Had Bowerman, whose penal dossier included a prior history of mental disturbance and futile but violent attempts to escape, set in motion the tragic events of September 13th on his own, with the appellants playing only an unwilling and unwitting part, as they contended, or, instead, had Culhane and McGivern actively aided and abetted Bowerman, as Singer swore." (Fuchsberg, J., dissenting, *see* Appendix A). Defendants' Exhibit O, official records detailing Bowerman's previous attempts to escape from custody on his own, attempts to seize a gun and assault

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[3]Most of the issues raised and briefed in the appellate courts below, *inter alia*, the trial court's onesided marshalling of the evidence (*see* Appendix B, dissent), the wide-ranging cross-examination of the petitioners over the details of prior offenses, and the exclusion of competent and relevant impeachment evidence of the prosecution's main witness, are not presented here. Their presence shows that the constitutional errors of the trial court were not harmless.

guards on his own, and attempted suicide, went directly to the central factual issue in the trial. The trial court, sustained by the Court of Appeals, excluded Exhibit O as neither competent nor relevant.

The decision of the New York Court of Appeals implicates the entire understanding of the compulsory process clause developed from its modern origin in *Washington v. Texas*, 388 U.S. 14 (1967).[4] The issue and holding in *Washington*, framed in terms of exclusion of exculpatory evidence by means of an arbitrary state standard of competence, is directly confronted.[5] The logic of *Washington* applies as well to relevance: for State case law or legislature cannot so define relevance as to exclude exculpatory evidence within the meaning of the compulsory process clause. In this context, a commentator has concluded that "the defendant has a constitutional right to present any evidence that may reasonably be deemed to establish the existence of facts in his favor." P. Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 207 (1975). It has long been observed that evidence of the kind offered by the defendants can tend to exonerate an innocent accused:

[4]The right to offer testimony rests, as well, on broad, if vague, due process grounds. *See In re Oliver*, 333 U.S. 257, 273 (1948). The development of the more clear and specific compulsory process analysis has been lauded as a major conceptual advance of this Court. P. Westen, *Compulsory Process*, 73 Mich. L. Rev. 71 (1974).

[5]Although quoting the trial judge's ruling that the records were not "competent" (Appendix A, opinion at n.1), the thrust of the Court of Appeals' opinion was to relevance, terming the issue "collateral." It is hard to see what rationale would even purport to justify terming the official records "not competent." As noted by the dissenting Justice, they were unimpeachable in their source and were kept in the regular course of business.

> "It should be noted that this kind of [prior act] evidence may be also available to *negative the accused's guilt. E.g.*, if A is charged with forgery, and denies it, and if B can be shown to have done a series of similar forgeries connected by a plan, this plan of B is some evidence that B and not A committed the forgery charged."

2 J. Wigmore, *Evidence* § 304 at 205 (3d Ed. 1940).

The conclusion in the dissent that the proferred proof was reliable, relevant and material accords with the nature of the proof and charges.[6]

In contradistinction the New York Court of Appeals has fashioned a rule of evidence that cannot stand scrutiny. The court found that evidence establishing a pattern of solitary prior escape attempts by Bowerman would be *irrelevant* "unless it were additionally shown that the prior escape attempts had been made in comparable circumstances, including the presence but nonparticipation of other potential escapees." (At n.1). At the same time, the court found the proffer excludable as potentially confusing, a "mass of miscellaneous records," "80 pages of the undifferentiated, unredacted files of the Corrections Department with respect to Bowerman . . . ." Thus simultaneously, the New York Court of Appeals would exclude the records as remote and confusing, while permitting their introduction into evidence if the defendants could show that "potential escapees" (persons in no way connected with the proceeding) did not participate in escape attempts not previously litigated and not at issue in the trial.

[6]On the issue of materiality, it must be remembered that Bowerman was dead at the time of trial. Exhibit O was the only means available to petitioners to attempt to demonstrate Bowerman's similar prior unassisted escape attempts.

State rules of evidence based on commonly accepted and understandable grounds, such as the exclusion of hearsay, must yield to a defendant's constitutional right to present witnesses in his own defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973).[7] Even as well accepted a State interest as protecting juveniles from the embarrassment of exposing a record of a prior offense must yield to the right of a defendant "to seek out the truth in the process of defending himself." *Davis v. Alaska*, 415 U.S. 308, 320 (1974). Perforce, an evidentiary standard arbitrary to the border of incoherence cannot be raised to block the introduction of potentially exculpatory evidence on the crucial issue at trial.

II. Fifth Amendment.

THE NEED FOR THIS COURT TO HEAR THIS CASE CAN BE STATED IN ONE SENTENCE: IS *RAFFEL v. UNITED STATES*, 271 U.S. 494 (1926) CONFINED TO ITS PECULIAR FACTS, OR WAS IT IMPLICITLY OVERRULED BY *DOYLE v. OHIO*, 426 U.S. 610 (1976), OR IS IT STILL CONTROLLING AUTHORITY FOR THE STATE AND FEDERAL COURTS? [8]

Raffel held that a defendant who testifies at his or her second trial, but who did not testify at the first trial, may be impeached by the prior silence when the purpose in

[7]The compulsory process clause applies equally to documents and to witnesses. *United States v. Burr*, 25 F.Cas. 187 (No. 14694, C.C.D. Va. 1807); *United States v. Nixon*, 418 U.S. 683 (1974).

[8]Although the fifth amendment question in *Raffel* arose in a federal prosecution, and the holding may be said to have been grounded upon this Court's supervisory power, it has been followed or distinguished by numerous state and federal courts. At least since this Court's opinion in *Malloy v. Hogan*, 378 U.S. 1 (1964), this phenomena is undoubtedly based on the oft-quoted passage in *Malloy* that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." *Id.* at 11.

testifying is to deny some statements attributed to him or her by a witness who has offered the same testimony at both trials.

In *D[illegible]* it was held that cross-examination of a defendan[illegible]bout his post-arrest silence after receiving Miranda warnings violates due process. *Raffel* was not cited in the majority opinion, although its continued vitality was questioned by four Justices.

This case closely parallels the certified question, answered in the negative, in *Raffel:* "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial to disclose that he had not testified as a witness in his own behalf upon first trial"? 271 U.S. at 496. Were it not for this Court's opinions subsequent to *Raffel*, the trial court's ruling might seem correct.[9]

A brief sketch of some of this Court's opinions since *Raffel* demonstrates the ambiguity between the holding in that case and the holding in *Doyle*.

In *Johnson v. United States*, 318 U.S. 189 (1943), it was suggested, in *dicta*, that when a defendant asserts a privilege against compulsory self-incrimination in the

[9]However, this point is not conceded here. There are significant distinctions between the facts in *Raffel* and the facts of this case. In Raffel's first trial, an officer testified that Raffel made a statement upon arrest. Raffel remained silent. At the second trial, Raffel took the stand and stated that he did not make the statement. Thus, there was a technical inconsistency. Raffel's silence at the first trial was an admission by silence with respect to the specific statement at issue. The analagous modern rule is embodied in Federal Rule of Evidence 801(d)(2)(B). In this case, however, McGivern was impeached with his prior silence, and adverse inferences were drawn therefrom, with respect to broad areas of his testimony.

midst of his testimony, and the assertion is upheld by the trial judge, the silence cannot be adversely commented upon by the prosecution in the face of a properly lodged objection.

In *Grunewald v. United States*, 353 U.S. 391 (1957), a defendant was asked on cross-examination why he had asserted the fifth amendment before the grand jury in response to the same questions which he later answered at trial. The holding was unanimous. The five Justices of the majority reaffirmed *Raffel*, but stressed that *Grunewald* differed in that it turned on whether reference to the prior silence was in fact probitive in impeaching the defendant's credibility. *Id.* at 418-424. The court held that the defendant's silence before the grand jury was wholly consistent not only with his innocence, but also with his trial testimony. However, four Justices concurring in *Grunewald* indicated that *Raffel* should be overruled. The rationale of that concurrence runs through the decision in *Griffin v. California*, 380 U.S. 609 (1965), holding that the privilege against compulsory self-incrimination barred both adverse comment by the government on a defendant's silence and jury instructions that such silence is evidence of guilt.[10] *Raffel* was not cited in the *Griffin* opinion.[11]

[10]See also *Stewart v. United States*, 366 U.S. 1 (1961) (the demeanor of a defendant whose testimony is "gibberish" cannot be challenged by introducing the fact that he failed to testify at former trials).

[11]The continued vitality of *Griffin* is emphasized by this Court's opinion in *Lakeside v. Oregon*, 55 L.Ed.2d 319 (1978), holding, among other things, that a *Griffin* cautionary instruction over the defendant's objection is not a violation of the privilege against compulsory self-incrimination.

In *United States v. Hale*, 422 U.S. 171 (1975), it was held, on nonconstitutional grounds, that cross-examination of the defendant as to his silence during a police interrogation was prejudicial error and that, based on the circumstances of his custody, he had no motivation to speak. *Raffel* was distinguished, *id.* at 175, based on the reasoning in *Grunewald*.[12]

In the majority opinion in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), holding, among other things, that an adverse inference may be drawn from an inmate's assertion of the fifth amendment at a disciplinary proceeding, *Raffel* was cited with apparent approval. *Id.* at 318. *Baxter* has not, however, signalled a departure from this Court's developing fifth amendment doctrine. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977).

The tension between the holdings in *Raffel* and *Doyle*, discussed at length by the dissenting Justices in *Doyle*, 426 U.S. at 532 n.11, asks for clarification by this Court. Given the frequency of retrials, virtually every criminal defendant is affected in a crucial decision by this uncertainty in the law. Consequently, every criminal trial is affected as well.

Even if this Court chooses not to resolve that ambiguity, this case should be heard. As discussed above, *Raffel* may rest on its own peculiar facts. This case is controlled by *Grunewald*. There, as here, the prior silence of the accused was wholly consistent with innocence. McGivern properly invoked his privilege at the

[12]Although in *Doyle* the majority stated certiorari was granted to decide the constitutional question left open in *Hale*, the question was not answered to the extent it was left open. In *Hale*, 422 U.S. at 175, n.4 the majority stated that the question that was left open was whether the *Raffel* decision had continued vitality.

prior trials. He cannot be penalized for the valid assertion of his fifth amendment rights.

CONCLUSION

For all of the above reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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Dated: October 11, 1978

APPENDIX

APPENDIX A

The People of the State of New York, Respondent, v. Charles Culhane and Gerald McGivern, Appellants.

45 NY 2d 757

Argued June 7, 1978

July 13, 1978

HEADNOTE:

Crimes - Murder

An order of the Appellate Division which affirmed the murder convictions of defendants, charged with killing a Deputy Sheriff during an attempt to escape from custody is affirmed, in a Memorandum by the court.

People v. Culhane, 57 AD2d 418, affirmed.

SYLLABUS:

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that court, entered June 10, 1977, which affirmed judgments of the Ulster County Court (Robert H. Ecker, J.), rendered upon verdicts convicting defendants of murder. Defendants were charged with killing a Deputy Sheriff during an attempt to escape from custody. (For facts and prior appeal, see 33 NY2d 90)

William M. Kunstler, Michael E. Tigar (admitted pro hac vice), Karen K. Peters and John Mage for Appellants.

E. Michael Kavanagh, District Attorney (Paul Guner and Edward M. P. Greene of counsel), for respondent.

MEMORANDUM.

The order of the Appellate Division should be affirmed.

We have examined the several contentions advanced by defense counsel and conclude that there should be an affirmance. We comment briefly with respect to some of such contentions.

On the basis of careful postmortem dissection it can be said that in charging the jury the trial court's marshaling of the evidence fell short of the ideal. The court has an obligation to marshal or refer to the evidence, however, only to the extent necessary to explain the application of law to the facts (CPL 300.10[2]). The critical issue on appellate review is whether the deficiency, if any, was such as to deny either defendant a fair trial. We are satisfied that the material issues, both factual and legal, were made abundantly clear to the jury in consequence, *inter alia*, of the informed efforts of competent defense counsel, and that there was no such inadequacy of explanation or other error of commission or omission as to result in prejudice to either defendant.

Several of the trial court's evidentiary rulings which are challenged by defendant fell within the recognized authority of the trial judge involving questions as to the admissibility of evidence offered with respect to collateral matters. We include in this category the exclusion of evidence sought to be introduced to impeach the credibility of Deputy Sheriff Singer—the record of the proceeding before the State of New York Employees' Retirement System in which Singer's application for accidental disability retirement based on injuries suffered during the escape attempt was denied, and evidence with respect to his receipt from the Police Officers Association of an award in which there was a recital of events at some odds with his testimony. Similarly, evidence of Bowerman's record of past armed escapes and of his psychiatric disorders would have gone only to the collateral issue of his role in the escape attempt.[1] Nor do we find any error in the trial court's rulings as to the scope of the People's cross-examination of either defendant as to prior convictions (including the facts underlying such convictions) and acts of misconduct. Neither was it error to admit the photograph of the deceased deputy sheriff. We find no abuse of discretion as a matter of law in any of these evidentiary rulings. It is, of course, not determinative or even persuasive that apparently contrary rulings have been upheld in other cases in what may seem to be similar situations.

[1]The Evidence offered consisted of 80 pages of the undifferentiated, unredacted files of the Corrections Department with respect to Bowerman covering a period of some 18 years. The dissenter now urges that this evidence, offered en masse, should have been admitted on the theory that a few selected portions might have tended to establish a propensity on Bowerman's part to make escape attempts alone and unassisted. Such proof would have been irrelevant unless it were additionally shown that the prior escape attempts had been made in comparable circumstances, including the presence but nonparticipation of other potential escapees. There was, however, no tender of any such additional showing. No claim was made that the prior escape attempts were made in comparable circumstances, and examination of the file discloses great dissimilarity of circumstance. In fact the files were collectively offered for a much broader purpose: "to show what kind of individual [Bowerman] is", in support of the defense theory that the defendants were "the vicitims of the maneuvering, manipulations" of Bowerman. This mass of miscellaneous records, not directly related to the events comprising the charges against these defendants, would only have produced confusion, invited speculation and inevitably have led the jury into excursions into collateral matters. The trial court exluded this remote and potentially confusing evidence on the ground that it was not "competent or relevant". The authorities cited by the dissenter involve situations in which proof that a third party had been the criminal actor would have established the innocence of the defendant. By contrast here, proof that Bowerman might have been disposed to instigate this escape attempt would not have exonerated these defendants for their participation in it.

Within the ambit of the trial court's responsibility was the preliminary factual determination that McGivern's statement of asserted innocence was not spontaneous so as to qualify it for admission under the exception to the hearsay rule. There was no error in the resolution of that question when the statement was not made until McGivern's arrest some two and one-half hours after the commission of the crime.

Finally, we find no error in the denial of defendants' pretrial motions to be permitted to appear as their own cocounsel or in the denial of the posttrial motion to set aside the verdicts because of the failure of the People to produce the photograph of Bowerman after his death.

In sum, we agree with the majority at the Appellate Division that there was no error which calls for a reversal of the conviction of either defendant.

FUCHSBERG, J. (dissenting):

This murder case has been tried three times. In the first trial, the jury disagreed. The second, which resulted in convictions and sentences of death, was followed by unanimous reversal by this Court (33 NY2d 90), essentially for the failure of the trial judge to excuse biased veniremen for cause on the voir dire. Because the third trial was marred by the exclusion of what I believe to be competent, relevant and potentially exculpatory evidence, I am constrained to vote for reversal and another trial.

Since the salient facts are adequately detailed in our prior opinion, they need only be briefly recounted here. On September 13, 1968, three inmates of the Auburn State Prison, Charles Culhane, Gerald McGivern and Robert Bowerman, were being taken by automobile to

a courthouse in Westchester County in connection with a *coram nobis* proceeding brought on behalf of Culhane. Two deputy sheriffs, Joseph Singer and William Fitzgerald, occupied the front seat. The three manacled prisoners, joined to the vehicle by leather security belts, were in the rear. The party never reached Westchester, the trip ending en route in the death of Fitzgerald and Bowerman and near-mortal gunshot wounds for Culhane and McGivern.

The three survivors were the only eyewitnesses. Deputy Singer, the single one available to the People in effect was arrayed against the two surviving prisoners, each of whom testified in his own behalf at the trial.[1]

According to the story related by Singer, Bowerman and Culhane attacked the deputies from the rear, using their locked handcuffs to choke the two officers as McGivern seized Singer's revolver and fired it at Fitzgerald. Singer went on to state that he then fired at the two defendants, though the medical evidence tended to refute his assertion that he was choked by the handcuffs and the ballistics evidence introduced similar doubts as to his version of the shooting.

Appellants described the events very differently. Their claim was that it was only Bowerman, who, after cutting his own security belt with a concealed razor blade and unsuccessfully trying to persuade his fellow prisoners to do the same, struck at Fitzgerald and Singer and grabbed the latter's gun. As they told it, Bowerman, while holding them at gunpoint, had then undone Culhane's belt and forced Culhane in turn to undo McGivern's

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[1] In this Court's earlier opinion we noted that the prosecutor's evidence "presented substantial questions of credibility" (33 NY2d, at p. 96, n.1).

belt, at which point Fitzgerald suddenly turned, gun in hand, precipitating an exhange of fatal shots between himself and Bowerman.

Thus, the trial's central factual issue was clearly framed: Had Bowerman, whose penal dossier included a history of mental disturbance and futile but violent efforts to escape, set in motion the tragic events of September 13th on his own, with the appellants playing only an unwilling and unwitting part, as they contended, or, instead, had Culhane and McGivern actively aided and abetted Bowerman, as Singer swore?

To back their claim that Bowerman had initiated the escape episode and had carried it through to its grisly end on his own, the appellants, among other things, sought to introduce the official prison and medical records chronicling his past attempts to free himself of prison and police custody. These records would have established that Bowerman was "suffering from a psychosis" and had been frustrated in his plans to escape on at least three earlier occasions. During the fourteen years immediately preceding the events which resulted in the two killings involved in this case, he pursued repeated methods of self-release, ranging all the way from suicidal slashing of his wrists to a try at winning his freedom by shooting his way past a detective whose firearm he had seized. As recently as 1964, a Corrections Department Guidance Counselor officially reported him "highly dangerous". Earlier, he had spent four months in the Matteawan State Hospital for the Criminally Insane after the State prison authorities at Elmira had at various times observed that he was poorly adjusted, depressed, and emotionally unstable. Significantly, in every one of these documented events, with the possible exception of one at the Brooklyn House of Detention, where an entry

indicated that "it was rumored he planned a spectacular jail break with the aid of a girl friend on the outside", he was the lone participant.

The majority, in affirming, nevertheless finds no "abuse of discretion" in the exclusion of this documentary evidence by the trial court, both when offered directly or as grist for cross-examination. It is difficult to understand how these records, unimpeachable in their source and having been kept in the regular course of business (cf. *People v. Foster*, 27 NY2d 47, 52; *Kelly v. Wasserman*, 5 NY2d 425, 429), could be claimed to have been collateral, since they bore directly on the main, and most critical question of whether the conceded culpability of Bowerman was shared or unshared with the defendants.[1]

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[1]The trial record goes far beyond the majority's suggestion that the excluded proof was offered solely to show Bowerman's general bad character. The colloquy which followed the offer could have left no doubt in the trial judge's mind but that it was also directed in particular to those portions of the public records relating to Bowerman's solo escape ventures. As defense counsel put it, a primary purpose was to show that Bowerman "didn't care about his life, this man, the records would reflect, was involved in escapes" and, for that reason, counsel "picked out those portions which we considered essential" because they went "to the very heart of the issue, who precipitated this break, who killed Fitzgerald, *was it done by Bowerman alone or was it done by Bowerman in conjunction with our clients, which we vehemently dispute. . . .*" The District Attorney did not misconceive this purpose. In objecting, he stated, "This simply goes to show propensity which is not admissible". And the trial judge, in explaining his ruling, after merely remarking that the evidence would be "irrelevant" and "incompetent", fell back to the unelaborated position that "it would be highly unfair to permit the evidence of this type and it would deprive the People of a fair trial". Thus, the very issues raised on this appeal—that the records were relevant and competent and that their exclusion or reception would affect the fairness of the trial—were expressly passed upon at trial and so preserved for our review. (emphasis supplied)

Of course, the jury would not have been compelled to conclude that, because Bowerman had demonstrated a propensity for violent jailbreaking and an equally consistent penchant for practicing it without the aid of others, he did in fact follow those patterns in this instance. But, it can hardly be denied that it may very well have made a world of difference to the triers of fact in deciding whether the escape was the work of but one man, Bowerman. Had they been aware that Bowerman was the only one of the three prisoners with a known propensity for endeavoring to escape and that he had never demonstrated that propensity in alliance with other prisoners, instead of being left, as the jurors were here, with an impression that none of the three prisoners appeared to have had any greater inclination to escape than the others, it is conceivable that the defense would have been credited.

Thus, the proferred proof was not only reliable. It was also relevant and material, on the principle that it is a defense to a criminal accusation that a person other than the defendant committed the crime. For that purpose, "similar acts . . . can be used to *exonerate an innocent accused*, where the acts evidencing the plan are those of a third person not the defendant" (2 Wigmore, Evidence [3d ed.], §341, p. 245 [emphasis in org.]; cf. *People v. Fiore*, 34 NY2d 81). Under the theory of the defense, Bowerman must be considered a "third party". As we have already indicated, the defendants' version of the events was not that Bowerman had "instigated" the escape or acted "in conjunction" with them. To the contrary, they were "vehement" in their position that it had been "done by Bowerman alone".

Consequently, the admission of Bowerman's "similar acts" to help establish the defendants' noncomplicity in

the escape and the murder would have been in conformity with the proposition that the most acceptable "test of relevancy is whether a reasonable man might believe the probability of the truth of the consequential fact if he knew of the proferred evidence" (1 Weinstein's Evidence, ¶401 [07], p. 401-27; see also Thayer, A Preliminary Treatise on Evidence at Common Law, pp. 264-265 [1898]; McCormick, Evidence [2d ed] §185, p. 437).

Furthermore, uncharged immoral or criminal acts are admissible if they are probative of a matter in issue (e.g., *People v. Jackson*, 39 NY2d 64; *People v. Molineux*, 168 NY 264). Although generally excluded when the prior conduct involved is that of an accused (see *People v. Fiore*, 34 NY2d 81, *supra*), this is for reasons of policy rather than logic (*People v. Mayrant*, 43 NY2d 236, 239; *People v. Zachowitz*, 254 NY 192, 198). So, when excluded, it is rarely for lack of relevancy, but because of inherent prejudice to the accused (see *People v. Davis*, 44 NY2d 269, 274). However, when, as here, the prior conduct of a third party is at issue (cf. *People v. Duffy*, 44 AD2d 298, 306, n.3 [Shapiro, J.], affd. 36 NY2d 258, cert. den. 423 US 861), absent countervailing considerations of prejudice, the relevancy and materiality of the evidence is to be judged on its own merits.

On that score, it has been well said that, "one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again, [and therefore] evidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions" (*Halloran v. Virginia Chems.*, 41 NY2d 386, 391, a civil case whose principles are applicable to criminal cases as well [CPL 60.10]; see also, *People v.*

Miller, 39 NY2d 543). In the practical application of this experiential principle, there appear to be no valid grounds for distinguishing between a case where the dispute revolves about an issue as to whether a person acted alone or in concert and a case in which the issue posed is whether the person acted at all.

Moreover, if there were a valid evidentiary rule of exclusion—and the majority points to none—the evidence would still have to be received on the even more fundamental ground that its exclusion violated the constitutional right of the appellants to present exculpatory evidence on the issue on which, in the end, their guilt or innocence turned (see, generally, Clinton, The Right to Present a Defense: An Emergent Guarantee in Criminal Trials, 9 Ind. L. Rev. 713).

As *Chambers v. Mississippi* (410 US 284), which overturned the exclusion of a third party's confession as hearsay, makes clear, the constitutional right of a defendant "to present witnesses in [his] own defense" (p. 302) is not to be yielded up to unduly restrictive evidentiary practice. It simply will not do to point to a technical rule of evidence or an incident of judicial discretion which violates that credo. This is not to say that criminal defendants are entitled to an open sesame in the reception of evidence. Rather, the right to present exculpatory material is to be measured by the "fundamental requirements of fairness" (*United States v. Brooks*, 480 F.2d 1310, 1311; see also, *Davis v. Alaska*, 415 US 308). That was not done here.

Finally, in view of what I find to be the decisiveness of this issue, it is unnecessary to discuss other disturbing aspects which, singly or in combination, added to the denial of a fair trial. Included among these was the charge to the jury, which the two dissenting Justices at

the Appellate Division cogently critized (57 AD2d 418, 421).

Accordingly, my vote is for reversal and a new trial.

APPENDIX B

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. Charles Culhane et al, Appellants.

57 AD2d 418

Third Department

June 2, 1977

CATCHLINES:

Crimes - murder - charge to jury.

HEADNOTE:

1. Defendants were properly convicted of murder in the second degree. The central issue was one of credibility and the jury exercised its good judgment and common sense in weighing the testimony. The sole defense was that a dead associate was the prime actor in an attempt to escape and, even assuming that to be so, the jury was justified in finding defendants guilty.

2. The charge to the jury was not so unfair as to require reversal. The court charged time and again that it was not its recollection or its marshaling of the facts that the jury was to consider but the jury's own recollection. The court charged the prior criminal record of defendants, but made it plain that it was to be considered only of the issue of defendants' credibility. The return of the jury on several occasions for further instructions demonstrates the careful examination given in reaching its decision and makes it clear that the jury did not consider the charge prejudicial, slanted or unfair.

APPEAL from a judgment of the Ulster County Court (ROBERT H. ECKER, J.), rendered April 23, 1975, upon a verdict convicting defendants of murder in the second degree.

Karen K. Peters (Michael E. Tigar and William M. Kunstler of counsel), for appellants.

Francis J. Vogt, District Attorney, for respondent.

HERLIHY

HERLIHY, J. This case has been tried three times. The first jury failed to agree and a mistrial resulted. The second trial resulted in a conviction which was set aside by the Court of Appeals in *People v. Culhane* (33 NY2d 90). The instant trial resulted in a conviction of the crime of felony murder. This appeal ensued and defendants have raised several issues urging reversal. After a careful consideration of defendants' contentions we are of the view that only two require comment by us.

While this is an appeal following a retrial, the general and underlying facts are sufficiently set forth in *People v. Culhane* (supra) and need not be repeated here.

Defendants contend that there is insufficient evidence to sustain the conviction. On this appeal, therefore, we must view the facts most favorably to the People (*People v. Cleague*, 22 NY2d 363, 366).

The central issue at the trial was one of credibility as to the testimony of the witness Singer and the testimony of the two defendants. The jury, as it usually does, exercised its good judgment and common sense in weighing the testimony and found the defendants guilty and it would be difficult to conceive of a jury doing otherwise. The defendants' sole defense was that a dead associate was the prime actor in the attempt to escape and even assuming that to be so, the jury was justified in finding the defendants guilty.

The only remaining issue concerned the charge of the court and experienced criminal lawyers seek to convince

this court that certain parts thereof were out of proportion. It is this court's opinion that the charge may be read in its entirety as often as one might wish and never come away with the reaction that it was so unfair to these defendants as to require a reversal. The court meticulously charged time and again that it was not its recollection or its marshaling of the facts that they were to consider, but it was the jury's own recollection. It charged the prior criminal record of these defendants, but made it explicitly plain that it was to be considered only on the issue of the credibility of these defendants. The jury, of course, knew that the defendants were imprisoned at the time of the commission of the crime as they were in the process of being transported from Auburn State Prison to the Westchester County Court to be present at a coram nobis hearing.

It should be noted that the jury returned on several occasions for additional instructions and for reading parts of the testimony, all of which demonstrates the careful and thorough examination given in reaching its ultimate decision and which, in and of itself, makes it crystal clear that as to the jury, it did not consider the charge in any way prejudicial, slanted or unfair. After a four-week trial marked by considerable interruptions, objections, and bench conferences held at the request of the attorneys for the defendants, it was the obligation of the court to marshal the facts. On one occasion when the jury returned for additional information where it appeared that the court may have been in error as to one minor part of the charge, the court said: "I caution you once again, as I have on at least two occasions during the course of my charge, and that is, as to any reference of fact that I made in my charge to you, it is your recollection, the combined recollection of the twelve of you,

that must govern and not my recollection nor that of the attorneys."

The court's attention has been called to the memorandum decision of the Court of Appeals in *People v. Williamson* (40 NY2d 1073). A reading of the record and the opinion of the Appellate Division (48 AD2d 863) is convincing that that decision is in no way controlling. In that case two police officers investigating the crime directly contradicted each other's testimony as to the facts surrounding the happening of the event. Such a contradiction in testimony presented a sufficient reason for a court to mention the numerous inconsistencies in the testimony of the witnesses for the prosecution. The present trial lasted approximately four weeks while the Williamson trial was of short duration. Additionally, there were numerous other areas of concern in the latter case, including the sentence, which raised serious issues requiring a reversal, none of which are here present.

We have examined the numerous other alleged errors as set forth in the brief of the defendants and, after a review of the record, we find them to be without merit. (see *People v. Crimmins,* 36 NY2d 230, 239)

The judgment should be affirmed.

SWEENEY, J. (dissenting). We are unable to agree with the majority that the judgment should be affirmed and, therefore, we dissent and vote to reverse. In our view, the trial court's marshaling of the evidence was so one-sided and unfair as to constitute prejudicial error. The court had the obligation to marshal the evidence only to the extent necessary to "explain the application of the law to the facts" (CPL 300.10). The court chose to marshal the evidence in some detail. It summarized the direct testimony of all of the witnesses, and, in addi-

tion, the cross-examination of defendants. It made no comment on Singer's cross-examination. This becomes quite significant when we consider that the court charged the jury of the importance of cross-examination in testing the truth and credibility of a witness. The court also mentioned some of the inconsistencies of the defendants' testimony, but none of the numerous inconsistencies in Singer's testimony. Furthermore, the court pointed out that the defendants had an interest in the outcome of the trial which could be considered in evaluating their testimony, but failed to point out any interest Singer might have had. The court further charged that the jury could consider defendants' admitted crimes in evaluating their credibility or believability. It then enumerated the prior convictions of each defendant. Later in the charge it again mentioned the prior convictions of Culhane and the various sentences he received. Assuming a more detailed marshaling of the evidence was required, it is axiomatic that any marshaling, nevertheless, must be done fairly.

On this record, we are of the view that the charge taken in its entirety was so unfair that any prejudice created thereby was not remedied by the court's recitation of a few general principles of law. The harm was accentuated when we consider that the marshaling of the evidence which, concededly, favored the prosecution, was the last word the jury heard on the case before submission. Credibility was of critical importance. The indictment was one for felony murder. The prosecution contended and offered proof that the defendants and Bowerman were all attempting an escape at the time Fitzgerald was killed. The defendants contended and testified that only Bowerman was attempting an escape and they took no part in it. A resolution of the issue, therefore, narrowed to who was telling the truth. Under

these circumstances, we cannot consider the error harmless (*People v. Williamson*, 40 NY2d 1073).

The judgment should be reversed and a new trial ordered.

KOREMAN, P. J. and KANE, J., concur with HERLIHY, J.; SWEENEY and MAHONEY, JJ.'s, dissent and vote to reverse in an opinion by SWEENEY, J.

APPENDIX C

The PEOPLE of the State of New York, Respondent, v. Charles CULHANE and Gerald McGivern, Appellants.

Court of Appeals of New York.

Oct. 23, 1973.

33 N.Y.2d 90, 95-6, 350 N.Y.S.2d 381, 385-6, 305 N.E.2d 469, 472-3

(factual segment)

* * * * *

The facts underlying the appellants' conviction are relatively brief. On September 13, 1968 three prisoners, Culhane, Bowerman, and McGivern were being taken by auto from the Auburn State Prison to White Plains in connection with a *coram nobis* hearing on behalf of Culhane. The two escorting Deputy Sheriffs were riding in the front seat of the car. The car was Deputy Sheriff Fitzgerald's personal car so there was no screen separating the prisoners from the two Deputy Sheriffs, Singer and Fitzgerald, who were riding in the front seat. Each deputy carried a .38 caliber revolver at his side.

Prisoners Culhane and McGivern were handcuffed to a loop in front of their security belt. Each belt buckled in the back. Prisoner Bowerman's belt was fastened in the front with a chain and a hasp to which the handcuffs were attached. None of the belts were attached to each other. At the time of the incident in question, Culhane was sitting behind the driver, McGivern was in the middle and Bowerman was on the right, behind the passenger side of the front seat.

They never reached White Plains, for the trip ended in violence in Ulster County, during the course of which the

appellants were wounded and the prisoner Bowerman and Deputy Sheriff Fitzgerald were killed.

Appellants were charged with felony murder for killing the Deputy Sheriff during an attempted escape (Penal Law, § 125.25, subd. 3). At the trial the People relied on both circumstantial evidence and the eyewitness testimony of Deputy Singer to prove their case. Singer's testimony, which was inconsistent as to certain particulars, was used to show that Bowerman and Culhane "jumped" the deputies from behind using their handcuffs to choke them while McGivern seized one of the Sheriffs' revolvers and killed Fitzgerald.[1] Evidence was also submitted demonstrating that Bowerman's belt had been cut on the left side; appellants' belts had been unbuckled; and that a search of the prisoners' clothes revealed that Bowerman possessed a handmade handcuff key, and Culhane, a razor blade.

Defendants' theory was that only the deceased prisoner, Bowerman, had attempted to escape.

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[1] Since we have concluded that there must be a new trial, it would be inappropriate to explore in detail the merits or weaknesses of the People's case. For the purposes of this appeal we need only note that the prosecutor's evidence—taken in the context of this particular trial—presented substantial questions of credibility for the jury's consideration. This places in bold relief the issue concerning the propriety of the jury selection process.

* * * * *

APPENDIX D

McGIVERN–CROSS

[2492] Q: How much did you get during the course of that robbery?

MS. PETERS: Your Honor, I object.

THE COURT: Overruled.

A: I have no idea how much was involved. The robbery was stopped while it was in progress.

Q: I see. What about the first robbery? How much did you get on that?

MS. PETERS: I object Your Honor.

THE COURT: Overruled.

A: I believe it was somewhere in the area of about $270.00. Around there. And a couple of cartons of cigarettes.

[2493] Q: Though you testified in one of those cases, correct?

A: Yes I did.

Q: I see. And aside from that particular case and this trial, those are the only times you ever testified in a criminal action before? Am I correct?

A: No. I testified once.

Q: Where?

A: In Westchester.

MS. PETERS: Your Honor, I object. I don't think this is relevant.

THE COURT: I think he is referring to the time he said before. I will overrule it.

Q: So am I correct you testified once in Westchester and you testified here before this jury in this trial? Am I correct?

A: Now I am testifying, yes.

McGIVERN–CROSS

[2502] Q: Now you were present, am I correct, when Mr. Culhane testified in the first trial. Correct?

A: Yes I was.

Q: Now when Mr. Culhane testified in the first trial, did he mention any of those three points to the jury, if you recall?

MR. ROTHBLATT: I object.

[2503] MS. PETERS: I object. How does Mr. McGivern know that? There is an entire transcript . . . .

MR. KAVANAGH: Let's ask him if he remembers specifically. If he doesn't he can say so. You don't have to testify for him.

MR. ROTHBLATT: Whether it was mentioned or not mentioned I submit it is not binding upon the trial of this case. We are not bound upon the questions that were asked in the first trial, Your Honor.

MR. KAVANAGH: I submit that it is extremely relevant to the theory of recent fabrication. As to those three points, I submit it is the prosecution's theory, and we intend to argue in summation, that those three points were created by Gerald McGivern just prior to coming into this

court to answer the proof that had been advanced by the prosecution in this trial. And thus, the basis for me asking these questions.

THE COURT: Will you read the question that has been objected to?

REPORTER READ BACK THE QUESTION.

[2504] THE WITNESS: I don't remember him even being asked the question.

BY MR. KAVANAGH CONTINUING:

Q: O.K. You indicated, I believe, earlier on cross-examination that you had read Charles Culhane's testimony, or at least the transcript thereof not too long ago. Correct?

A: Right.

Q: And did you notice when you were reading that transcript that Mr. Culhane had left out these three areas when he testified?

A: I don't remember him even being asked the question in the transcript.

Q: I didn't ask you that. Was it covered when Culhane testified in the first trial? He had his own attorney present, did he not?

A: I am sure he did.

Q: You were there. Did he or didn't he?

A: Yes.

MR. ROTHBLATT: I object to this witness being asked questions about what was not said.

KAVANAGH–SUMMATION

[2703] Now, I would like to break down this story to show you, to demonstrate to you, how Mr. Singer's statement, Mr. Singer's version of what happened [2704] which he first gave on the day of the incident, is essentially consistent with all of the findings that were arrived at sometime later. Number one. And you must remember, this time Mr. Singer did not have the benefit of the version of the story that Mr. Culhane was going to tell a year and a half later and that Mr. McGivern was going to tell six and a half years later. He didn't know what they were going to say. Singer says first that they were driving along. Culhane comes over the top. Bowerman comes over the top of Fitzgerald and McGivern goes for Singer's gun.

[2723] Now going through what the two defendants told you, there were three major point differences. Three major points where Mr. McGivern differs from Mr. Culhane. All they are inconsistent. They are not inconsistent. They are simple additions. Well, ask yourself, why is it important, assuming they are lying, for Mr. McGivern, six and a half years later to come into this courtroom and say that he saw Singer walk Culhane around that car. Why is that important? Why couldn't Culhane do it? Well, the reason Culhane couldn't do it is because Culhane was already tied to the testimony he gave in the first trial and he couldn't change his story.

[2724] Which was, that he was unconscious and when he went over that seat he doesn't know how he

got there. He can't tell you how he got there. So what happened was, that defendants sat down together and realized that that act of Mr. Culhane's and the location that he was found by the police, that that was not consistent with innocence. If he dove over that seat he was trying to get Fitzgerald's gun. So what the defendants decide is that they had to create an explanation. They had to pattern their story to the evidence and they had to create some type of version that there was an innocent act. So what do they do? Six and a half years later, McGivern testifies that he was walked around and McGivern expects you to buy that during that entire six and a half year period that he never mentioned that to Culhane.
